Supreme Court, U.S.
FILED
SEP 7 - 2006
OFFICE OF THE CLERK

No. 05-1572

In the Supreme Court of the United States

MICHELLE BAZZETTA, et al

Petitioners,

v.

PATRICIA L. CARUSO, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Does an incarcerated felon in Michigan have a constitutionally protected liberty interest in prison visitation pursuant to the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

This case involves an eleven-year-old controversy between incarcerated felons, their visitors and the Michigan Department of Corrections ("MDOC"). Petitioners include eleven class representatives, on behalf of themselves and all others similarly situated, including all inmates incarcerated by MDOC and non-incarcerated potential visitors of MDOC inmates. Respondents are the Michigan Department of Corrections and the Director of the Michigan Department of Corrections.

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STATEMENT OF THE CASE

On Jur[illegible], 2003, this Court unanimously reversed the April 10, 2002 Opinion of the United States Court of Appeals for the Sixth Circuit,[1] in its entirety.[2] Rather than repeat the lengthy and complex history in this case, Respondents rely on the factual and procedural background set forth in *Overton*.[3] In its decision, this Court held that MDOC's 1995 prison visitation restrictions, as they pertain to non-contact visits, did not violate the First, Eighth, or Fourteenth Amendments to the United States Constitution. On August 28, 2003, in accordance with this Court's decision, the Court of Appeals vacated its decision affirming the District Court's April 19, 2001 Findings of Fact and Conclusions of Law,[4] and remanded the case back to the lower court for further consideration in light of this Court's decision.[5]

On September 29, 2003, the District Court held a status conference in which Petitioners took the position that the District Court's determination that MDOC's ban on visitation for a minimum of two years for any inmate found guilty of two or more major misconducts for substance abuse violated the Fourteenth Amendment, was still valid in spite of the unanimous reversal by this Court in *Overton*.[6] After the parties briefed the issue, and the District Court heard argument by both sides, the District Court determined that because this Court did not specifically grant Respondents' writ of certiorari on the procedural due process issue, Petitioners' claim of procedural due process violations and the District Court's findings and conclusions on that issue were still valid after *Overton*.[7] With regard to Petitioners' assertion that the District Court had the authority to enforce its May 16, 2002 Order of Compliance in

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[1] *Bazzetta v McGinnis*, 286 F 3d 311 (CA 6 2002).

[2] *Overton v Bazzetta*, 539 US 126 (2003).

[3] *Overton*, 539 US 126.

[4] *Bazzetta v McGinnis*, 148 F Supp 2d 813 (ED Mich 2001).

[5] Pet. App. pp. 30a-31a.

[6] *Overton*, 539 US 126.

[7] *Overton*, 539 US 126.

spite of *Overton*,[8] the District Court agreed with Petitioners' position, and scheduled a conference with Counsel to discuss implementation of specific provisions of the May 16, 2002 Order of Compliance.[9]

Prior to the scheduling conference, Respondents filed a motion requesting an evidentiary hearing in the District Court. In their motion, Respondents argued that in order for the lower court to have the authority to enforce its May 16, 2002 Order of Compliance based on Petitioners' procedural due process argument, it had to find that inmates in Michigan have a liberty interest in prison visitation. Because the District Court's finding that MDOC's substance abuse visitation restriction policy was unique among state prison systems was no longer valid after *Overton*,[10] the District Court's conclusion that MDOC's policy imposed an atypical and significant hardship on inmates, and thus, violated the Fourteenth Amendment, was reversible error. *Sandin v Connor*.[11] Petitioners opposed Respondents' request for an evidentiary hearing by taking the position that incarcerated felons have a liberty interest in prison visitation pursuant to the First Amendment right to intimate association.

The District Court issued an Order Denying Defendants' Motion for Evidentiary Hearing and Certifying Interlocutory Appeal Pursuant to 28 USC § 1292(b).[12] The District Court ruled that Petitioners' procedural due process claim was not barred by *Overton*,[13] because the Supreme Court relied on *Turner v Safley*,[14] which only applies if a constitutional right is at issue. However, the District Court did certify the issue of whether inmates in Michigan have a liberty interest in prison visitation for

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[8] *Overton*, 539 US 126.

[9] Res. App. pp. 17b-32b.

[10] *Overton*, 539 US 126.

[11] *Sandin v Conner*, 515 US 472 (1995).

[12] Pet. App. pp. 24a-26a.

[13] *Overton*, 539 US 126.

[14] *Turner v Safley*, 482 US 78 (1987).

appeal. Respondents' Petition for Permission to Appeal was timely filed pursuant to 28 USC § 1292(b) on February 20, 2004. On March 2, 2004, Petitioners filed their Brief in Opposition to the Petition for Permission to Appeal.

On June 10, 2004, the Court of Appeals entered an Order denying Respondents' Petition for Permission to Appeal as unnecessary and treating the petition as a timely filed notice of appeal pursuant to 28 USC § 1292(a)(1).[15] The Court of Appeals issued its decision reversing the District Court's December 23, 2003 opinion and order that had denied Respondents' motion for summary judgment regarding the procedural due process issue and had granted Petitioners' motion to enforce compliance of the District Court's May 16, 2002 Order of Compliance.[16] As support for its decision, the Court of Appeals noted that, although the Supreme Court did not grant certiorari on the procedural due process issue, based on its analysis of the "unusual" component of the Eighth Amendment's prohibition against cruel and unusual punishment and its determination that MDOC's substance abuse visitation restriction policy at issue was not a "dramatic departure from acceptable standards for conditions of confinement," the Supreme Court implicitly ruled that inmates in Michigan do not have a liberty interest in prison visitation.[17]

Petitioners' Petition for Rehearing with Suggestion for En Banc Review was filed in the Court of Appeals on September 26, 2005. In their petition, Petitioners argued that the Court of Appeals erred when it held that this Court had already addressed the procedural due process issue in *Overton,* and that the *Overton* decision was inconsistent with the District Court's ruling that its May 16, 2002 Order of Compliance was still valid, after this Court's unanimous reversal of the lower courts' decisions in *Overton*. Although it was not included as an issue in Respondents' appeal of right, Petitioners also argued that the

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[15] Pet. App. pp. 21a-23a.

[16] *Bazzetta v McGinnis*, 423 F3d 557 (CA 6 2005). Res. App. pp. 1b-16b.

[17] *Overton*, 539 US 126, and *Sandin*, 515 US 472.

Court of Appeals erred when it did not address the issue of whether minor children can be accompanied by an adult immediate family member of the prisoner or the child. After Respondents filed a response opposing Petitioners' petition, the Court of Appeals issued an Amended Opinion and an Amended Judgment.[18] A review of the Court of Appeals' Amended Opinion reveals that the only substantive change from its September 13, 2005 Opinion was in the conclusion.[19] In its Amended Opinion, the Court of Appeals clarified that this Court's decision in *Overton,*[20] foreclosed Petitioners' procedural due process claim, and therefore, the District Court abused its discretion when it refused to dissolve its May 16, 2002 Order of Compliance. In addition, on that same day, the Court of Appeals issued a letter requesting that Counsel for Petitioners determine whether the Suggestion for En Banc Review be withdrawn.

On December 12, 2005, Petitioners filed a Memorandum of Law in Supplemental Support of En Banc Review. In their Memorandum of Law, Petitioners raised exactly the same issues that they had raised in their September 26, 2005 Petition for Rehearing with Suggestion for En Banc Review.[21] The Court of Appeals' Order denying Petitioners' Suggestion for Rehearing En Banc and their petition for rehearing was entered on March 9,

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[18] *Bazzetta v McGinnis*, 430 F 3d 795 (CA 6 2005). Pet. App. pp. 3a-20a.

[19] *Bazzetta*, 430 F 3d at 805. Pet. App. pp. 20a.

[20] *Overton*, 539 US 126.

[21] In an attempt to find some other basis for complying with the requirement of FRAP 35, Petitioners argued that the panel's September 13, 2005 decision was in conflict with another decision of this Court, *Austin v Wilkinson*, 372 F 3d 346 (CA 6 2004), aff'r in part, rev'd in part, 545 US 209; 125 S Ct 2384; 162 L ED 2d 174 (2005). However, *Austin* involved a liberty interest that was created by Ohio state regulations concerning the placement of a small percentage of inmates -- "the worst of the worst" -- in Ohio's only super maximum facility. In contrast, the Michigan substance abuse visitation restriction policy applies to prisoners generally, unlike the "supermax" condition at issue in *Austin*. There is absolutely no dispute in this case that neither Michigan state statutes nor MDOC's regulations create a liberty interest in prison visitation.

2006.[22] Petitioners' March 14, 2006 Motion to Stay the Mandate was denied by the Court of Appeals on March 24, 2006. This Court denied Petitioners' March 31, 2006 Application for Stay of Mandate by letter on April 5, 2006. Petitioners' Petition for Writ of Certiorari was filed on June 6, 2006.

REASONS FOR DENYING WRIT

As set forth below, this Court has never held that an incarcerated felon has a constitutionally protected liberty interest in prison visitation pursuant to the Fourteenth Amendment of the United States Constitution. In addition, the November 28, 2005 Amended Opinion of the Court of Appeals is not in conflict with a decision of any other courts of appeal. Therefore, the November 28, 2005 Amended Opinion of the Court of Appeals was correct and this Court should deny Petitioners' Petition for Writ of Certiorari.

I. Incarcerated felons in Michigan have no liberty interest in prison visitation.

The Fourteenth Amendment protects an individual from being deprived of life, liberty or property, without du process of law. A due process claim is examined in two steps. First, the Court must first ask whether the individual possess a liberty or property interest which has been interfered with by the State. Second, the Court must ask whether the procedures attendant upon that deprivation were constitutionally sufficient.[23] Thus, in order for the District Court to have the authority to require Respondents to make any changes to their substance abuse visitation restriction policy, it must first find that inmates in Michigan have a liberty interest in prison visitation.

In evaluating claims of constitutional rights by prison inmates, it is important to always bear in mind the special

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[22] Pet. App. pp. 1a-2a.

[23] *Ky Dept of Corrections v Thompson*, 490 US 454, 459-460 (1989) (citing *Hewitt v Helms*, 459 US 460, 472 (1983)).

principles that apply in the unique prison context. Although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v Safley*,[24] "imprisonment carries with it the circumscription or loss of many significant rights." *Hudson v Palmer*[25] ("prisoners have no legitimate expectation of privacy and . . . the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells"). "The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, *Wolff v McDonnell*, [418 US 539, 555 (1974)], chief among which is internal security, see *Pell v Procunier*, [417 US 817, 823 (1974)]."[26] "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," *Pell*.[27] There can be no dispute that inmates retain many of the protections of the First Amendment, such as rights to free expression, *Thornburgh v Abbott*[28]; to petition the government for the redress of grievances, *Johnson v Avery*[29]; and to free exercise of religion, *O'Lone v Estate of Shabazz*.[30] But even "[i]n the First Amendment context . . . some rights are inconsistent with the status of a prisoner," *Shaw v Murphy*,[31] and a prisoner retains only those rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[32]

The "ordinary incidents of prison life" include conditions that impair visitation. "[T]he Due Process Clause does not

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[24] *Turner*, 482 US at 84.

[25] *Hudson v Palmer*, 468 US 517, 524, 530 (1984).

[26] *Hudson*, 468 US at 524.

[27] *Pell v Procunier*, 417 US 817, 822 (1974) (quoting *Price v Johnston*, 334 US 266, 285 (1948)).

[28] *Thornburgh v Abbott*, 490 US 401, 407 (1989).

[29] *Johnson v Avery*, 393 US 483 (1969).

[30] *O'Lone v Estate of Shabazz*, 482 US 342, 348 (1987).

[31] *Shaw v Murphy*, 532 US 223, 229 (2001).

[32] *Pell*, 417 US at 822; *Turner*, 482 US at 95.

protect every change in the conditions of confinement having a substantial adverse impact on the prisoner."[33] The Due Process Clause liberty interest of a duly convicted prison inmate is not infringed when he is transferred from one prison to another "for whatever reason or for no reason at all," within the State or to another State, regardless of differing conditions in the prisons.[34] Even a transfer to a maximum security facility with more burdensome conditions is "within the normal limits or range of custody which the conviction has authorized the State to impose."[35] This is true even though such a transfer operates as a "real hardship" on the inmate who is "effectively separated by the transfer from his only contact with the world outside the prison."[36] Analysis of "the nature of the interest involved . . . compels the conclusion" that such a transfer, even with its changed conditions of confinement, "does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself."[37]

In *Meachum v Fano*,[38] this Court explicitly acknowledged that protected liberty interests could spring from two discrete sources. Not only could a state independently establish a protected liberty interest on the basis of State law, but if the conditions of confinement are egregious, a liberty interest could arise from the Due Process Clause itself. Moreover, in *Meachum*,[39] this Court noted that not all changes in conditions of confinement that have a substance adverse impact on prisoners is

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[33] *Sandin*, 515 US at 478.

[34] *Meachum v Fano*, 427 US 215, 228 (1976); *Montanye v Haymes*, 427 US 236 (1976); *Olim v Wakinekona*, 461 US 238 (1983).

[35] *Meachum*, 427 US at 225.

[36] *Montanye*, 427 US at 242, n 4 (quoting from the Court of Appeals decision, 505 F 2d 977, 981 (CA 2 1974)).

[37] *Olim*, 461 US at 248.

[38] *Meachum*, 427 US 215.

[39] *Meachum*, 427 US 215.

sufficient to invoke the protections of the Due Process Clause.[40] Petitioners have not alleged the existence of a State-created liberty interest in prison visitation and, neither Michigan statutes nor Michigan's 1995 prison visitation regulations create such a liberty interest. Therefore, in order for Petitioners to prevail on this issue, this Court would have to find that the Due Process Clause of the Fourteenth Amendment, itself, is the source of a liberty interest with regard to incarcerated felons and prison visitation.

A. In *Overton* this Court held that incarcerated felons have no liberty interest in prison visitation under the Fourteenth Amendment.

In its June 16, 2003 decision, this Court addressed various procedural aspects of MDOC's 1995 visitation restrictions imposed as a result of two or more substance abuse misconducts. Not only did this Court acknowledge that reinstatement of visitation was entirely within the warden's discretion, but it also noted that the substance abuse misconducts at issue may involve "minor" infractions of the rules[41]:

> Respondents argue that the regulation bears no rational connection to preventing substance abuse because it has been invoked in certain instances where the infractions were, in respondent's view, minor. Even if we were inclined, though, to substitute our judgment for the conclusions of prison officials concerning the infractions reached by the regulations, the individual cases respondents cite are not sufficient to strike down the regulations as to all non contact visits. Respondents also contest the 2-year bar and note

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[40] *Meachum*, 427 US at 224. For a good analysis of Supreme Court decisions issued prior to *Sandin*, see: Merolli, Note and Comment, "Atypical and Significant Hardship" Signals the Demise of State-Created Liberty Interests for Prisoners, 15 St. Louis U Pub L Rev 93 (1995).

[41] *Overton*, 539 US 15 134.

> that reinstatement of visitation is not automatic even at the end of two years. We agree the restriction is severe. And if faced with evidence that MDOC's regulation is treated a de facto permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation. Those issues are not presented in this case, which challenges the validity of the restriction on non contact visits in all instances. (Emphasis added).

Thus, it is simply untrue that this Court's decision did not deal with Petitioners' claim that MDOC's 1995 visitation restrictions violated Petitioners' rights to procedural due process. Although the questions presented to this Court for review did not specifically include the procedural due process claim, both parties briefed the issue and this Court reversed the lower courts' rulings that Respondents violated Petitioners' procedural due process rights. In addition, this Court noted that the lower courts' rulings in this case would not support an "individual claim" of a procedural due process violation "based on indefinite withdrawal of visitation."[42]

The Court of Appeals' review of *Overton* in its November 28, 2005 Amended Opinion, reveals that the Court of Appeals was correct when it determined that this Court ruled that MDOC's substance abuse visitation restriction policy did not implicate a liberty interest under the Due Process Clause of the Fourteenth Amendment.[43]

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[42] *Overton*, 539 US at 137. The fact that the Court of Appeals quoted this same language in its August 28, 2003 Order Vacating and Remanding does not change the fact that Petitioners' Third Amended Complaint does not raise "an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards." Pet. App. pp. 30a-31a.

[43] *Bazzetta*, 430 F 3d at 795. Pet. App. pp. 3a-20a.

In *Overton* this Court said[44]:

> Much of what we have said already about the withdrawal of privileges that incarceration is expected to bring applies here as well. Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline. This is not a dramatic departure from accepted standards for conditions of confinement. Cf. *Sandin v Connor, 515 U.S. 472, 485, 132 L. Ed 2d 418, 115 S. Ct. 2293 (1995)*. . . . If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations. An individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, however, would not support the ruling of the Court of Appeals that the entire regulation is invalid.

Therefore, the Court of Appeals' November 28, 2005 Amended Opinion was correct in determining that this Court's unanimous reversal of the lower courts' rulings that MDOC's 1995 visitation restrictions violated Plaintiffs' procedural due process rights because the policy was not a dramatic departure from accepted standards for conditions of confinement. Thus, Petitioners' procedural due process claims are without merit and their Petition for Writ of Certiorari should be denied.

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[44] *Overton*, 539 US at 136-137.

B. Incarcerated felons in Michigan have no liberty interest in prison visitation under the Due Process Clause of the Fourteenth Amendment.

In *Ky Dept of Corrections v Thompson*,[45] this Court upheld prison regulations that precluded certain persons from visiting with incarcerated felons, determining that there is no Fourteenth Amendment right to prison visitation.

> Respondents do not argue - nor can it seriously be contended, in light of our prior cases - that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause. We have rejected the notion that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. . . . The denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence, *Hewitt v Helms*, 459 US at 468; 74 L Ed 2d 675; 103 S Ct 864, and therefore is not independently protected by the Due Process Clause.[46]

Previously in *Olim v Wakinekona*,[47] this Court held that the transfer of a state prisoner from Hawaii to California did not violate the Due Process Clause and that Hawaii's prison regulations regarding transfers did not create a protected liberty interest under the Fourteenth Amendment. "Respondent's argument to the contrary is unpersuasive. The Court in *Montanye*[48] took note that among the hardships that may result

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[45] *Kentucky*, 490 US at 454.

[46] *Kentucky*, 490 US at 460-461.

[47] *Olim*, 461 US 238.

[48] *Montayne*, 427 US 23.

from a prison transfer are separation of the inmate from home and family, separation from inmate friends, placement in a new and possibly hostile environment, difficulty in making contact with counsel, and interruption of educational and rehabilitative programs. . . . These are the same hardships respondent faces as a result of his transfer from Hawaii to California."[49]

Recently, in *Sandin,* this Court refused to find that any state action taken for a punitive reason encroaches upon a liberty interest protected by the Due Process Clause of the Fourteenth Amendment:

> The punishment of incarcerated prisoners, on the other hand, serves different aims than those found invalid in *Bell* and *Ingraham.* The process does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission. It effectuates prison management and prisoner rehabilitation goals. . . .
>
> Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law.

The exact issue before the Supreme Court in *Sandin* was whether punishment imposed pursuant to Hawaii's regulations regarding prison discipline created a liberty interest protected under the Fourteenth Amendment. The minimum two-year prison visitation ban at issue in this case is also imposed as the result of a prison disciplinary proceeding.[50]

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[49] *Olim*, 461 US at 248.

[50] It should be noted that the Court of Appeals has already determined that MDOC's misconduct hearing process meets the requirements of the Due

In *Sandin*,[51] this Court specifically addressed the question whether disciplinary confinement of inmates itself implicates constitutional liberty interests. The conditions of such confinement were "concededly punitive" but the case "does not present a dramatic departure from the basic conditions of Connor's indeterminate sentence," so the Court held that "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest."[52] "The regime to which he was subjected as a result of the misconduct hearing was within the range of confinement to be normally expected" for one serving such a prison sentence.[53]

The Court of Appeals has not directly addressed the issue of whether an incarcerated felon in Michigan has a constitutionally protected liberty interest in prison visitation pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, in *Spear v Sowders*,[54] the Court of Appeals noted that a person seeking to enter a penal institution to visit an inmate does not have the same constitutional rights as that person would have on a public street or in his or her home. "It is clear that a prisoner does not have a due process right to unfettered visitation. . . . A *fortiori*, a citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension."[55] In addition, the other circuits that have addressed the issue of whether there is a liberty interest in prison visitation have determined that the Due Process Clause of the Fourteenth Amendment does not protect an inmate's right to visitation.[56] "Ware's loss of visitation privileges is within

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Process Clause of the Fourteenth Amendment. *Copeland v Machulis*, 57 F 3d 476 (CA 6 1995).

[51] *Sandin*, 515 US at 485.

[52] *Sandin*, 515 US at 485.

[53] *Sandin*, 515 US at 487.

[54] *Spear v Sowders*, 71 F 3d 626 (CA 6 1995).

[55] *Spear*, 71 F 3d at 629-630 (citations omitted).

[56] *Ware v Morrison*, 276 F 3d 385 (CA 8 2002).

the ordinary incidents of confinement and cannot be considered an atypical and significant hardship. . . . We agree with the Eleventh Circuit in *Caraballo-Sandoval* and we hold that Ware had no constitutionally protected interest implicated by the suspension of his visitation privileges."[57] *See also, Caraballo-Sandoval v Honsted*,[58] where the Eleventh Circuit upheld the denial of visitation for two years to an inmate and his visitor who misled prison authorities about their relationship.

As set forth above, in this case there is absolutely no dispute that MDOC's prison regulations regarding visitation do not create a liberty interest in prison visitation protected by the Fourteenth Amendment. In its February 11, 2004 Order, the District Court determined that MDOC's substance abuse visitation restriction policy must involve a constitutionally protected liberty interest, or this Court's analysis under *Turner*,[59] in *Overton v Bazzetta*,[60] would have been superfluous. As support for its February 11, 2004 Order, the District Court referred to prior decisions of this Court dealing with constitutionally protected liberty interests.[61] However, none of the cases cited by the District Court involved incarcerated felons. This error by the District Court is critical because this Court has repeatedly upheld prison policies that would be unconstitutional if applied to free citizens.[62] A review of prior decisions of this Court involving prisoners reveals that the Court has never held that the Due Process Clause of the Fourteenth Amendment itself creates a constitutionally protected liberty interest in prison visitation.[63] In addition, none of the other circuit courts that have addressed this

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[57] *Ware*, 276 F 3d at 387-388.

[58] *Caraballo-Sandoval v Honsted*, 35 F 3d 521 (CA 11 1994).

[59] *Turner*, 482 US 78.

[60] *Overton*, 539 US 126.

[61] Pet. App. pp. 24a-26a.

[62] *Bd of Regents v Roth*, 408 US 564, 572-73 (1972); *Santosky v Kramer*, 455 US 745 (1982); *Stanley v Illinois*, 405 US 645 (1972); and *Freedman v Maryland*, 380 US 51 (1965).

[63] *Kentucky*, 490 US at 454.

issue have found a liberty interest in prison visitation protected by the Due Process Clause of the Fourteenth Amendment.

Defendants submit that given this Court's holding in *Overton,* that MDOC's substance abuse visitation restriction policy is not a dramatic departure from accepted standards for conditions of confinement. The Court of Appeals' November 28, 2005 Opinion was correct when it determined that incarcerated felons in Michigan have no liberty interest in prison visitation under the Due Process Clause of the Fourteenth Amendment. "Although the substance abuse regulation at issue here is 'severe,' see *Overton*, 539 US 126 at 134, . . . we decline to hold that, on its face, it rises to the level of egregious conduct necessary to implicate the implicit guarantees of the Due Process Clause."[64] This Court also failed to find that incarcerated felons have a liberty interest in prison visitation under the Fourteenth Amendment.[65] Thus, the District Court had no authority to require Defendants to make any changes to MDOC's substance abuse visitation restriction policy. Therefore, the November 28, 2005 Amended Opinion of the Court of Appeals reversing the February 11, 2004 Order of the District Court was correct and this Court should deny Petitioners' Petition for Writ of Certiorari.

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[64] *Bazzetta*, 430 F 3d 795. Pet. App. pp. 3a-20a.

[65] *Overton,* 539 US 126.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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Dated: September 2006

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MICHELLE BAZZETTA, et al., Plaintiffs-Appellees, v. KENNETH MCGINNIS, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS, Defendants-Appellants.

No. 04-1823

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

June 8, 2005, Argued
September 13, 2005, Decided
September 13, 2005, Filed

COUNSEL: ARGUED: Lisa C. Ward, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellants.

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ON BRIEF: Lisa C. Ward, Leo H. Friedman, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellants.

Deborah A. LaBelle, Patricia A. Streeter, LAW OFFICES OF DEBORAH LaBELLE, Ann Arbor, Michigan, Michael J. Barnhart, Detroit, Michigan, for Appellees.

JUDGES: Before: CLAY and SUTTON, Circuit Judges; OBERDORFER, District Judge. *

* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

OPINIONBY: Louis F. Oberdorfer

OPINION:

OBERDORFER, District Judge. This case marks another chapter in a ten-year controversy between incarcerated felons, their visitors, and the Michigan Department of Corrections ("MDOC"). In 1995, MDOC issued regulations affecting prisoners' visitation privileges, including a permanent ban on virtually all visitation for prisoners found guilty of two or more substance abuse violations. After a bench trial, the district court ruled that MDOC's visitation limitations, including the substance abuse regulation, violated the prisoners' constitutional rights under the *First* and *Eighth Amendments* and their *Fourteenth Amendment* substantive and procedural due process rights. A panel of this court affirmed the district court's judgment and the district court issued an order of compliance enjoining the MDOC from implementing the regulations. The Supreme Court granted the MDOC's petition for certiorari on the prisoners' *First, Eighth* and *Fourteenth Amendment* substantive due process claims and reversed this court's affirmance in *Overton v. Bazzetta, 539 U.S. 126, 156 L. Ed. 2d 162, 123 S. Ct. 2162 (2003)*. The Court did not grant certiorari with respect to the plaintiffs' *Fourteenth Amendment* procedural due process claim, nor otherwise address it directly. On remand, the district court declined to dissolve its injunctive order of compliance, ruling that its procedural due process holding was not disturbed by the Supreme Court's decision.

MDOC appeals the district court's refusal to dissolve the injunction, arguing that although the Supreme Court did not grant certiorari on this court's procedural due process holding, it implicitly foreclosed any facial procedural due process challenges to the substance abuse regulation. Thus, at issue is whether the district court abused its discretion in failing to dissolve its injunctive order in light of *Overton*. For the reasons stated below, we hold that the district court abused its discretion because its procedural due process ruling is inconsistent with *Overton*. Accordingly, we REVERSE the district court's opinion and order denying MDOC's motion for

summary judgment and granting the plaintiffs' motion to enforce compliance. Our reversal is without prejudice to any claim by an individual prisoner that the regulation, as applied to that prisoner, imposes an "atypical and significant hardship," thus implicating a protected liberty interest.

I. BACKGROUND

In 1995, MDOC issued regulations limiting the visitation rights of prisoners, in part to control the widespread use of drugs and alcohol. *Overton, 539 U.S. at 129-130.* Among other limitations, the regulations authorize the Director of the MDOC to restrict permanently all visits for a prisoner who is found guilty administratively of "two or more violations of the major misconduct charge of substance abuse," *e.g.* possession of narcotics, alcohol, unauthorized prescription drugs, or drug paraphernalia, or for failure to submit to a drug test. *Bazzetta v. McGinnis, 286 F.3d 311, 321 & n.2 (6th Cir. 2002)* (internal quotations omitted). According to the substance abuse regulation, prisoners whose visits have been permanently restricted nevertheless receive visits from "attorneys or [their] representatives, [or] qualified clergy and staff from the Office of the Legislative Corrections Ombudsman . . . ." *Bazzetta v. McGinnis, 148 F. Supp. 2d 813, 833 (E.D.Mich. 2001).* Inmates may also request that the visitation ban be lifted after six months or two years, depending on the underlying infractions. *Id.* Reinstatement of visitation privileges is within the warden's discretion. *Id.*

In August 1995, the plaintiffs, a class of prisoners incarcerated by MDOC, and their prospective visitors, challenged the substance abuse regulation on its face. n1 *Id. at 815.* They asserted that the permanent ban on visitors for two violations of the drug abuse policy: (1) infringed the prisoners' *First Amendment* right of intimate association and was not reasonably related to a valid penological objective; (2) constituted cruel and unusual punishment prohibited by the *Eighth Amendment*; and (3) violated the prisoners' *Fourteenth Amendment* procedural due process rights.*Id. at 845-58.* The case proceeded to a bench trial and, on April 19, 2001, the

district court held that the regulations violated the prisoners' rights under the *First, Eighth* and *Fourteenth Amendments. Id.*

> n1 The Plaintiffs also challenged regulations that: (1) excluded, from family members with whom inmates were entitled to non-contact visits, any minor nieces and nephews and children as to whom parental rights had been terminated; (2) required all children visiting an inmate to be accompanied by a family member or legal guardian; and (3) prohibited former inmates from visiting inmates. These regulations are not the subject of the instant appeal.

In addressing the plaintiffs' procedural due process claim, the court first asked whether Michigan prisoners have a liberty interest in visitation that had been infringed by the substance abuse regulation. *Id. at 857.* The court noted that a liberty interest arises from two distinct sources -- from the implicit guarantees of the *Due Process Clause* itself, or as a result of state action. *Id.* The court addressed only whether the prisoners derive a liberty interest from the state-issued substance abuse regulation. *Id.* Accordingly, it analyzed the regulations under the formulation established by the Supreme Court in *Sandin v. Conner, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995)* -- that a liberty interest arises where the state's regulations impose "freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the *Due Process Clause* of its own force, nonetheless impose[an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id. at 484.*

In determining that the substance abuse regulation imposes an "atypical and significant hardship," the court considered (1) the effect of the restraint on the length of prison confinement; (2) the extent to which the prisoners' confinement is altered from routine prison conditions; and (3) the duration of the restraint. *Bazzetta, 148 F. Supp. 2d at 857* (citing *Jones v. Baker, 155 F.3d 810, 814 (6th Cir. 1998)* (Gilman, J., concurring)). It acknowledged that the regulations do not affect

the length of confinement but found that they create "an unusually harsh and punitive environment for the prisoners restricted." *Id. at 858*. Further, it found significant that the restriction on visitation is permanent -- "although the regulations provide for the possibility of review after two years, there are many instances where no such review occurs, or where reinstatement of privileges after two years is denied." *Id.*

Recognizing a liberty interest in visitation that had been infringed by the permanent visitation ban, the court then asked "'whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Id. at 857* (citing *Hewitt v. Helms, 459 U.S. 460, 472, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983))*. It found many procedural problems with the implementation of the permanent visitation ban -- notably that: (1) there are no written criteria to guide the Director of the MDOC's decision whether to impose the ban, resulting in inconsistent enforcement, *id. at 836-37*; (2) prisoners are not entitled to a hearing on the imposition of the permanent ban or an opportunity to challenge the ban based on unusual or extenuating circumstances, *id. at 838, n.39*; and (3) there are no ascertainable criteria for the restoration of visiting privileges, without any apparent uniform standard being applied, *id. at 839*. The court thus determined that "the inconsistency and uncertainty of enforcement, the absence of any criteria for reinstatement, and the failure to provide any opportunity to be heard are all procedural deprivations of constitutional dimension." *Id. at 858*.

On April 16, 2002, a panel of this court affirmed the district court judgment for the plaintiffs. *Bazzetta v. McGinnis, 286 F.3d 311, 324 (6th Cir. 2002)*. The district court subsequently issued an order of compliance on May 16, 2002, directing MDOC to comply with the terms of the court's judgment and enjoining the Department from enforcing the regulations "or any rule, policy, or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for controlled substance violations." JA 75. In response to the

district court's order, MDOC lifted the regulations on visitation privileges on all inmates subject to the permanent ban. JA 189.

MDOC filed and the Supreme Court granted a petition for certiorari. The Court limited its review, however, to "whether the regulations violate the substantive due process mandate of the *Fourteenth Amendment*, or the *First* or *Eighth Amendments* . . . ." *Overton, 539 U.S. at 128*. On the merits, the Court reversed, ruling that the regulations did not facially infringe the prisoners' *First Amendment* rights of intimate association or violate their *Fourteenth Amendment* substantive due process rights. *Id. at 131-36*. In so holding, the Court stated that it was not implying that "any right to intimate association is altogether terminated by incarceration" but it noted that "we must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Id. at 131-32*; *see also id. at 134* ("Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose."). The Court also held that the withdrawal of visitation privileges did not "fall below the standards mandated by the *Eighth Amendment*." *Id. at 137*.

The *Overton* Court did not grant certiorari on the issue of whether the regulations violated the prisoners' procedural due process rights under the *Fourteenth Amendment*. In the context of its *Eighth Amendment* discussion, however, the Court noted that the "withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline . . . . is not a dramatic departure from accepted standards for conditions of confinement. *Cf. Sandin v. Conner, 515 U.S. 472, 485, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)*." *Id.* The Court admonished that "if the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." *Id. at 137*. It concluded, however, that "an individual claim based on indefinite

withdrawal of visitation or denial of procedural safeguards . . .would not support [a] ruling . . . that the entire regulation is invalid." *Id.*

On August 26, 2003, MDOC moved for peremptory reversal of the district court's order of compliance and dismissal of the case. A panel of this court denied the motion so that the district court could consider the validity of the order in the first instance. *Bazzetta v. McGinnis, 79 Fed. Appx. 161, 2003 WL 22434575, at *1 (6th Cir. 2003).* A separate panel of this court remanded the case to the district court "for further consideration in light of the Supreme Court opinion." *Bazzetta v. McGinnis, 73 Fed. Appx. 842, 2003 WL 22071463, at *1 (6th Cir. 2003).* This panel specifically noted that the Supreme Court preserved "any argument that an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards would pass muster under the *First* and *Eighth Amendments* . . . ." *Id.* (internal quotations omitted).

Meanwhile, MDOC reinstated the regulation permitting permanent visitation restrictions for two major misconduct substance abuse violations, with a few minor revisions. JA 161-62. MDOC voluntarily chose not to reinstate the restrictions on individual prisoners that were removed due to the May 16, 2002 order of compliance. *Id.*

On October 15, 2003, MDOC moved for summary judgment in the district court on the plaintiffs' procedural due process claims. JA 53-77. The plaintiffs countered with a motion to enforce compliance. JA 78-91. On December 23, 2003, the district court denied MDOC's motion for summary judgment, granted the plaintiffs' motion to enforce compliance and confirmed MDOC's obligation to present a proposal to cure the procedural due process violations arising from the imposition of the substance abuse regulation. JA 185-198. The district court acknowledged that MDOC had revised the regulation but found that it failed to correct the significant procedural problems associated with the implementation of the permanent ban on visitation. *Id.* Further, the district court rejected MDOC's mootness claim, holding that "it is well

settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" n2 *Id.* at 189 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 189, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000)* (internal quotations omitted)).

> n2 The court also held that the case was ripe for review because there is no factual development needed to discover how the regulation will be implemented, no indication that the MDOC will change its position regarding the enforcement of the regulation, and the hardship to the prisoners to wait until their visitation rights are revoked is great. JA 190-91.

Despite the district court's December 23, 2003 order, MDOC continued to issue permanent bans on visitation to inmates committing two major misconduct substance abuse violations. On February 11, 2004, upon further motions, the district court issued a supplemental order confirming its December 23, 2003 ruling and denying MDOC's motion for an evidentiary hearing. JA 299-301. The court, however, certified the question of whether its order was fully consistent with the Supreme Court's decision in *Overton* for interlocutory appeal, in accordance with *28 U.S.C. § 1292(b). Id.* at 301.

On February 20, 2004, MDOC petitioned for permission to appeal, representing that the district court had certified the question for review as "whether prisoners have a liberty interest in visitation." A panel of this court denied the petition as unnecessary, holding that MDOC, in reality, was seeking to appeal the district court's "order refusing to dissolve the injunctive relief previously ordered by the court [namely, the May 16, 2002 order of compliance] pursuant to its finding that the plaintiffs' procedural due process rights were violated." JA 328-29. Thus, the panel treated the petition as a notice of appeal pursuant to *28 U.S.C. § 1291(a)(1). Id.* We now entertain that appeal.

II. ANALYSIS

A. Standard of Review for Procedural Due Process Claims

The *Fourteenth Amendment* protects an individual from deprivation of life, liberty or property without due process of law. "Those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin, 162 L. Ed. 2d 174, 125 S. Ct. 2384, 2393 (2005).* Accordingly, a procedural due process analysis addresses two questions. "The first asks whether there exists a liberty or property interest which has been interfered with by the State, the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989)* (citations omitted).

In evaluating a claimed liberty interest by prison inmates, courts are mindful that imprisonment necessarily "carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer, 468 U.S. 517, 524, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984).* The "curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, chief among which is internal security." *Id. at 524* (internal citations omitted). Accordingly, not every "action taken for a punitive reason encroaches upon a liberty interest under the *Due Process Clause* . . ." *Sandin, 515 U.S. at 484.*

Prisoners, however, retain a "residuum of constitutionally protected liberty," *Thompson, 490 U.S. at 466* (Marshall, J., dissenting); *see Meachum v. Fano, 427 U.S. 215, 224, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976)* ("Our cases hold that a convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison."), that emanates from two discrete sources: (1) state law can establish a protectible liberty interest, or (2) the Constitution can create a liberty interest when a condition or restraint is so egregious as to implicate the *Due Process Clause* itself. *See Austin, 125 S. Ct. at 2393.*

Here, MDOC argues that the Supreme Court's decision in *Overton* implicitly held that the substance abuse regulation neither creates a protectible liberty interest nor implicates the guarantees of the *Due Process Clause* itself. MDOC claims that because the *Overton* Court foreclosed finding a liberty interest on the face of the regulation, when it determined that it did not constitute a "dramatic departure from acceptable standards for conditions of confinement," *Overton, 539 U.S. at 137*, the district court lacks authority to continue to enjoin its implementation of the substance abuse regulation, absent additional procedural safeguards. Accordingly, MDOC argues, the district court erred in refusing to dissolve its May 16, 2002 order of compliance.

The plaintiffs counter that the Supreme Court did not grant certiorari on the procedural due process issue and, thus, could not have overruled the holding of the district court that the substance abuse regulation established a liberty interest in visitation. In fact, the plaintiffs argue, the *Overton* Court expressly preserved their right to assert an "as applied" challenge to the regulation, such as the one sustained by the district court in this case. Moreover, they contend that even if the Supreme Court's decision foreclosed finding a state-created liberty interest arising from the substance abuse regulation, the prisoners' liberty interest in visitation is implicit in the *Due Process Clause*.

We review a district court's denial of a request to dissolve an injunction for abuse of discretion. *See Pinette v. Capitol Square Review & Advisory Bd., 30 F.3d 675, 678 (6th Cir. 1994), gaff'd, 515 U.S. 753, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995)*. However, a district court's improper application of governing law constitutes an abuse of discretion. *See United States v. Colahan, 635 F.2d 564, 566 (6th Cir. 1980);see also Mascio v. Public Emples. Retirement Sys., 160 F.3d 310, 311 (6th Cir. 1998)* (noting that a district court's decisions on injunctive relief are seldom disturbed unless it relied on clearly erroneous findings of fact, improperly applied governing law, or used an erroneous legal standard).

B. *Overton*'s Implicit Holding

Plaintiffs first argue that the district court did not improperly apply governing law, *i.e. Overton*, by refusing to dissolve its May 16, 2002 injunctive order because the *Overton* Court did not grant certiorari on the procedural due process issue. Further, they claim that nothing in the Court's decision indirectly undermined the district court's finding that the substance abuse regulation violated the prisoners' procedural due process rights. We agree that the Court did not grant certiorari or otherwise expressly address the procedural due process issue. Nonetheless, we find that the Court implicitly ruled on this issue, in a manner inconsistent with the holding of the district court.

In the context of analyzing the "unusual" component of the *Eighth Amendment's* prohibition against cruel and unusual punishment, the *Overton* Court held that the substance abuse regulation was a "regular means of effecting prison discipline" which did not constitute "a dramatic departure from accepted standards for conditions of confinement." This statement is antithetical to the district court's finding a liberty interest in prison visitation because the regulation imposes on prisoners an "atypical" hardship in comparison to the ordinary incidents of prison life. *See supra* page 5.

Furthermore, the *Overton* Court cited *Sandin* in support of its statement that the regulation was not a "dramatic departure." In *Sandin*, the only issue was the prisoners' right to procedural due process protection before placement in segregated confinement for 30 days, imposed as discipline for disruptive behavior. The *Sandin* Court observed that it had previously employed a methodology for identifying state-created liberty interests that emphasized "the language of a particular prison regulation" instead of "the nature of the deprivation." *515 U.S. at 481*. The Court abandoned this methodology, significantly limiting the authority of courts to find liberty interests stemming from positive state law in the prison context. Instead, it stated that the relevant inquiry must focus on the nature of the deprivation imposed on a prisoner, holding that if the

nature of the deprivation does not impose an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life," prisoners will not have a liberty interest in avoiding the deprivation. "Applying this refined inquiry, *Sandin* found no liberty interest protecting against a 30-day assignment to segregated confinement because it did not present a dramatic departure from the basic contours of the conditions of [the inmate's] sentence." *Austin, 125 S. Ct. at 2394* (internal quotations omitted).

We extrapolate from *Overton* and *Sandin* that the substance abuse regulation is neither a "dramatic departure," nor an "atypical and significant hardship" in relation to the ordinary incidents of prison life. Thus, although the issue was not directly before the *Overton* Court, Court precedent and dictum has signaled against our finding a liberty interest on the face of the substance abuse regulation.

C. "As Applied" Procedural Due Process Challenge

The plaintiffs claim, however, that the district court did not rule that the regulation on its face violated the prisoners' procedural due process rights. Instead, they assert, the district court found that the regulation, "as applied" to Michigan prisoners, triggered a state-created liberty interest. Citing the *Overton* Court's language that an individual prisoner could bring a "claim based on indefinite withdrawal of visitation or denial of procedural safeguards," and that "if faced with evidence that MDOC's regulation is treated as a de facto permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation," the plaintiffs maintain that *Overton* expressly preserved their right to bring "as applied" claims.

In arguing that their challenge, as sustained by the district court, does not attack the substance of the regulation, but merely its implementation, the plaintiffs misconstrue both the nature of the district court's ruling and the difference between a facial and as applied procedural due process challenge. The

district court held that the substance abuse regulation, on its face, created a liberty interest because it imposed an "atypical and significant hardship" on all prisoners subject to the restriction. *See Bazzetta, 148 F. Supp. 2d at 858.* While the court cited examples of the treatment of particular inmates in its findings of fact to illustrate what it perceived as the general procedural deficiencies in the implementation of the regulation, *id. at 836-43*, it did not make factual findings as to the application of the regulation to any particular prisoner sufficient to support an as applied procedural due process claim.

As detailed above, the *Overton* Court subsequently foreclosed a facial procedural due process challenge under the standard set forth in *Sandin*. The Court's decision in *Overton* does not preclude individual prisoners from challenging a *particular* application of the substance abuse regulation on *First Amendment*, *Eighth Amendment* or *Fourteenth Amendment* grounds but such "an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, . . . [does] not support the ruling . . . that the entire regulation is invalid." *Overton, 539 U.S. at 137*; *see also Jones v. Baker, 155 F.3d at 816* (Gilman, J., concurring) (noting that *Sandin*'s principal directive is that "courts should look to see if the *particular* inmate has been deprived of a state-created interest of 'real substance' ") (citing *Sandin, 515 U.S. at 478*); *McClary v. Kelly, 4 F. Supp. 2d 195, 199 (W.D.N.Y. 1998)* ("At its core, *Sandin* instructs courts to look at the nature and extent of the particular deprivation in deciding whether a protected liberty interest is implicated.").

D. Implicit Guarantees of Due Process Clause

Finally, the plaintiffs argue that regardless of whether the substance abuse regulation creates a liberty interest, such an interest emanates from the *Due Process Clause* itself because the permanent ban on visitation impinges on the prisoners' constitutional right to intimate association.

III. CONCLUSION

For the foregoing reasons, we hold that the district court abused its discretion in refusing to dissolve its May 16, 2002 order of compliance in light of the decision of the Supreme Court in *Overton*. We REVERSE the district court's December 23, 2003 opinion and order denying MDOC's motion for summary judgment and granting the plaintiffs' motion to enforce compliance and REMAND for further proceedings consistent with this opinion. Our reversal is without prejudice to any claim by an individual prisoner that the regulation, as applied to that prisoner, imposes an "atypical and significant hardship," thus implicating a protected liberty interest.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bazetta, et. al.,

Plaintiffs, Case No. 95-73540

v. Honorable Nancy G. Edmunds

McGinnis, et. al.,

Defendants.
_____/

OPINION AND ORDER (1) DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; (2) GRANTING PLAINTIFFS' MOTION TO ENFORCE COMPLIANCE; AND (3) DENYING DEFENDANTS' MOTION TO PLACE ATTORNEY FEES IN ESCROW

This matter came before the Court on three motions: (1) Defendants' third motion for summary judgment; (2) Plaintiffs' motion to enforce compliance; and (3) Defendants' motion to place attorneys' fees in escrow. Defendants' motion for summary judgment is DENIED because the Supreme Court's ruling in this case did not overturn this Court's judgment as to Plaintiffs' procedural due process claim. Plaintiffs' motion to enforce compliance is GRANTED. Defendants' motion to place attorneys' fees in escrow is DENIED.

I. Factual and Procedural Background

These motions arise out of Plaintiffs' objections to the following Michigan Department of Corrections (MDOC) regulations governing non-contact prisoner visitations:

(a) Mich. Admin. Code Rule § 791.6609(9), defining what persons are in an inmate's immediate family;

(b) Mich. Admin. Code Rule § 791.6609(2), limiting the number of visitors for a prisoner to an approved list of ten, not including immediate family and requiring visitors and immediate family members to be on a prisoner's list of approved visitors;

(c) Mich. Admin. Code Rule 791 .6609(2)(b), (5), and (6), restricting prisoner's access to minors, in that minors under the age of 18 are not permitted to visit unless they are the child, stepchild, or grandchild of the prisoner accompanied by an adult immediate family member or a legal guardian, and prohibiting a child to visit an incarcerated parent if the prisoner parent's rights have been terminated;

(d) Mich. Admin. Code Rule 791.6609(7), prohibiting former prisoners from visiting unless they are the immediate family of a prisoner or unless prior approval for the visit is obtained from the warden of the institution where the visit will occur;

(e) Mich. Admin Code Rule 791.6609(11), permanently banning all visitation (other than attorneys or clergy) for prisoners with two or more major misconduct charges of controlled substance violations.

On April 19, 2001, following a bench trial, this Court granted judgment for Plaintiffs. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). This Court ruled that all of the contested regulations violated the prisoners' First Amendment rights. This Court also held that the last rule, imposing a visitation ban for prisoners with two controlled substance violations, violated the Eight Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's procedural due process requirements. On appeal, the Sixth Circuit affirmed each of these conclusions.

On May 16, 2002, this Court issued an Order of Compliance directing the MDOC to comply with the terms of the Court's judgment, and specifically enjoined the MOOC from enforcing Rule 791.6609(11)(d) or any rule, policy, or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for controlled substance violations.

Following this Court's entry of judgment in favor of Plaintiffs, Plaintiffs moved for attorneys' fees as provided by statute. This Court granted Plaintiffs' motion after the Sixth Circuit affirmed the judgment. The Court granted the motion in two orders: an interim order dated June 27, 2002, which awarded $224,036.92 interim attorney fees, and an order dated August 19, 2002, which awarded the remaining $570,167.35 of requested fees, for a total of $794,204.27. Defendants paid Plaintiffs' attorneys the interim attorney fees, but posted a bond pending appeal of the second award.

The Supreme Court granted Defendants' petition for certiorari, limited to the following three questions:

> 1. Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments.
>
> 2. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests.
>
> 3. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

Overton v. Bazzetta, 123 S. Ct. 658 (2002).

The Supreme Court reversed the Sixth Circuit, ruling that none of the regulations facially violated the prisoners' First Amendment rights, and that the controlled substance violations did not facially violate the prisoners' Eighth Amendment rights. *Overton v. Bazzetta*, 123 S. Ct. 2162 (2003). The Court neither granted certiorari nor actually decided whether the controlled substance regulations violated the prisoners' procedural due process rights.

On August 28, 2003, the Sixth Circuit issued an Order Vacating and Remanding, stating:

> In the above-styled case the Supreme Court of the United States on June 16, 2003, reversed the decision of this Court holding that certain Michigan prison regulations were invalid on their face, but also reserving any argument that "an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards" would pass muster under the First and Eighth Amendments as incorporated by the Fourteenth Amendment. In light of the Supreme. Court's holding in his case, the previous judgment of this Court is vacated and the case remanded to the District Court for further consideration in light of the Supreme Court opinion.

In light of the Supreme Court's ruling, Defendants moved for the Sixth Circuit to reverse the May 16, 2002 Order of Compliance, but the Sixth Circuit denied their motion so that this Court could consider the validity of the order in the first instance.

II. Analysis

A. Defendants' Third Motion for Summary Judgment

Defendants move for summary judgment on Plaintiffs' procedural due process claims because (1) the Supreme Court implicitly rejected Plaintiffs' procedural due process argument, or in the alternative (2) Plaintiffs' procedural due process claim is moot.

The Supreme Court did not rule on Plaintiffs' due process argument, even though both this Court and the Sixth Circuit held that the permanent ban on visitation in response to two substance abuse violations violated prisoners' procedural due process rights. In fact, the Supreme Court did not grant its writ of certiorari on the due process issue, but instead the only questions before the Court were the First Amendment and Eighth Amendment issues. Therefore, this Court's decision that the regulation violates the prisoners' procedural due process rights is still valid.

Defendants also argue that this Court lacks subject matter jurisdiction over Plaintiffs' due process claims because this Court's May 16, 2002 Order of Compliance enjoined Defendants from enforcing the contested regulation or "any rule, policy or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for substance abuse." The MDOC removed all inmates from the visitation restriction list on May 17, 2002. After the Supreme Court's decision, the Department of Corrections reinstated the restriction on visitation based on two substance abuse violations. Defendants conclude that Plaintiffs' claims for injunctive and declaratory relief based on procedural due process violations became moot as of May 17, 2002.

Defendants' temporary lifting of the regulation in compliance with this Court's Order and their subsequent

reinstatement of it does not render this controversy moot. The Supreme Court has held that:

> It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' ' it did, the courts would be compelled to leave ' defendant. free to return to his old ways.' In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 708 (2000) (internal citations omitted).

More specifically, when an official agency removes an offending policy under court order pending an appeal of the lower court's order, the case is not mooted.

> Temporary compliance with a decree pending appeal, for example, clearly should not moot a case, unless other circumstances show that official policies really have changed. It is equally easy to deny mootness if officials who have changed their practices warn that former practices may be resumed at any time, or if officials who have not changed their practices simply argue that they may change some day in the future.

13A Charles Allen Wright et al., Federal Practice and Procedure § 3533.7 (2d ed. 1984). *See also Ammex v. Cox*, ____ F.3d ____, No. 01-2392 (6th Cir. December 3, 2003) (refusing to find that a withdrawn official action mooted the

case). Therefore, Plaintiffs' procedural due process claims regarding the ban on visitation after two substance abuse violations are not moot.

In a case decided on December 3, 2003, the Sixth Circuit held that the Michigan Attorney General's withdrawal of a notice of intent to enforce a statute against the plaintiff did not moot the case, but that the case was no longer ripe. *Ammex v. Cox*, ____ F.3d ____, No. 01-2392 (6th Cir. December 3, 2003). The Court stated: "Where, as in this case, the statute at issue has not been enforced against Ammex, and indeed where a notice of intent to enforce has been explicitly withdrawn, the ripeness doctrine provides the appropriate analysis for determining whether this case should be heard at this time." *Id.* Even though neither party frames the issue as one of ripeness, *Ammex* indicates that it may be the most appropriate framework to analyze this issue.

A court should weigh three factors to determine if an issue is ripe for adjudication:

> One aspect of the "judicial fitness of the issues" is the extent to which the legal analysis would benefit from having a concrete factual context. The second aspect of the "judicial fitness of the issues" is the extent to which the enforcement authority's legal position is subject to change before enforcement. The third consideration deals with the "hardship to the parties of withholding court consideration."

Id.

In *Ammex*, the Sixth Circuit held that all three factors weighed against ripeness. First, the court found that factual development would enhance the court's review of the constitutionality of the challenged statutory scheme.

> Ammex is not challenging a specific rule or finding of the Michigan Attorney General, but rather the general applicability of a statutory scheme to its conduct. Analysis of any preemption or Commerce Clause issue would benefit from knowledge of just what was forbidden by the MCPA, and what the effects of the state's regulation would be on the policies underlying the Interstate and Foreign Commerce Clauses and the federal statutes relied upon by Ammex.

Second, the court found that there was a strong possibility that the agency would change its position, especially since it withdrew its notice of enforcement. Third, the court did not find the hardship to the plaintiff in waiting was strong enough to outweigh the other two factors where there was no threat of criminal liability or huge immediate expense in temporary complying with the challenged statute.

Applying these three factors to the present case, Court concludes that this issue is ripe. First, there is no factual development needed to discover how the regulation will be implemented, since there was a full evidentiary hearing which established how it was implemented in the past. Second, there is no indication that the MDOC will change its position regarding the enforcement of the regulation. Third, hardship to the prisoners to wait until their visitation rights are revoked is great: after the revocation, they will not be permitted any visitors until the parties meander through the legal process. The Court therefore denies Defendants' motion for summary judgment.

B. Plaintiffs' Motion to Enforce Compliance

On August 26, 2003, Defendants issued Director's Office Memorandum 2003-14, which, among other things, reinstated the permanent restrictions for substance abuse violations, stating:

> The Supreme Court decision also allows the Department to again restrict visits for substance abuse misconducts, even if the misconduct is unrelated to a visit. Therefore, in accordance with Paragraph EE of PD 05.03.140, a prisoner who is found guilty of the major misconduct violation of "Substance Abuse" for behavior which occurs on or after August 27, 2003 shall have his/her visits limited to non-contact for 30 days. In addition, Wardens shall recommend to the Director that the visits of a prisoner be permanently restricted in accordance with Paragraphs BBB through EEE of PD 05.03.140 if the prisoner has been found gui1ty of two or more major misconduct violations of "Substance Abuse" which do not arise from the same incidence. Although the Supreme Court decision allows the Department to reinstate restrictions removed due to he (sic) lower courts' rulings, it has been decided that the restrictions will not be reinstated; however, recommendations shall be made to permanently restrict a prisoner's visits if his/her second or subsequent misconduct is based on behavior that occurs on or after September 1, 2003, regardless of when the first misconduct occurred.

(Attached as Supp. to Def. Third Mot. for Summ. J.)

This new DOM requires wardens to recommend a restriction regardless of when the first misconduct occurred. The original rules required both misconducts to have occurred after the rule's effective date. This change creates problems with notice because the first misconduct could have occurred before the rule was imposed, and problems with fairness because there can be years between the first and second substance abuse misconducts.

The new DOM also prohibits imposition of a second violation arising from the same incident. Plaintiffs argue that this new provision does not adequately address the Court's concern that the ban may be imposed for two incidents which were only hours apart and part of the same "pattern of behavior," because it is unclear how the MDOC defines "same incident."

On October 21, 2003, (after these motions were filed) Defendants issued DOM 2003-15, which further modifies the rule imposing visitation restrictions for substance abuse violations. (Attached as Pl. Reply to Def. Resp. in Opp. to Pl. Mot. to Enforce Compliance, Ex. 1.) Plaintiffs claim that the new procedures fail to correct the significant procedural problems associated with the implementation of the permanent ban on visitations in the following ways:

(1) The policy still provides that the warden is to submit the recommendation to impose a permanent ban to the regional prison administrator who, in turn, forwards a recommendation to the deputy director. If the deputy director agrees that the restriction is warranted the recommendation shall be submitted to the director for a final determination. There are no criteria or time limits for the passing on any of the recommendations.

(2) There are no written criteria to guide the director's decision whether or not to impose the restriction.

(3) There is no hearing procedure for a prisoner to challenge the imposition of the ban, and there is no appeal procedure.

(4) DOM 2003-15 prohibits a warden from submitting a recommendation for removal of the restriction if a prisoner has a subsequent substance abuse misconduct or a non bondable misconduct. Thus, the new rule even further limits a warden's discretion. The warden has the discretion not to recommend removal of the restriction for any other reason, and

there are not written standards which establish a basis on which a prisoner can rely to ensure reinstatement.

(5) The new procedure requires that a warden make a recommendation for permanent restriction no more than fourteen days after the second or subsequent substance abuse misconduct guilty finding. Plaintiffs contend that this does not adequately resolve the problem of excessive time between a guilty finding and the imposition of the restrictions because there are no consequences should the warden fail to make the recommendation within fourteen days. There are also no time limits for when the recommendation, which is sent by the warden to the Regional Prison Administrator, must be forwarded from the RPA to the Deputy Director or when the Deputy Director must forward it to the Director and/or when the actual decision must be made by the Director.

This Court previously held that the rule deprived prisoners of their procedural due process rights by the "inconsistency and uncertainty of enforcement, the absence of any criteria for reinstatement, and the failure to provide any opportunity to be heard." 148 F. Supp. 2d at 858. Plaintiffs request the following procedural mechanisms be required to address the Court's procedural due process concerns:

(1) Written substantive criteria for imposing and lifting permanent visiting restrictions that are relevant to the stated purposed of reducing substance abuse;

(2) A clear decision-making process that identifies the official who is actually responsible for making final decisions and insuring the restrictions are applied fairly and consistently;

(3) Time limits on the age of the misconducts that can be used to support a restriction;

(4) Limits on the time that can elapse between the second guilty finding and imposition of the restriction;

(5) Restricting imposition of visitation ban while underlying misconducts are being challenged through the appeal process;

(6) A hearing process before imposition of a permanent restriction to ensure that all criteria are met and no extenuating circumstances exist that warrant waiving the restriction or reducing its severity (e.g. by shortening its length, limiting it to non-contact visits, or limiting it to non-immediate family members), as occurs for individual visitor restrictions pursuant to PD 05.03.140, subsections OO-AAA;

(7) Adequate notice to the prisoner class before any misconduct findings can be used; and

(8) An appeal mechanism for the imposition of a permanent ban on visitation.

Plaintiffs also request that another rule be modified to comply with *Overton v. Bazzetta*. The rule limiting who can bring a child to visit an incarcerated parent states that a child must "be accompanied by an adult immediate family member or legal guardian" without indicating whether the adult must be an immediate family member of the child or the prisoner. The Supreme Court expressly interpreted the rule to permit visits if the child is "accompanied by an adult who is an immediate family member of the child or the inmate."

To ensure that the rules are not in fact inconsistent with the Supreme Court's findings, Plaintiffs request this Court to order Defendants to amend subsection KK of PD 05.03.140 to specify that eligible minor children may be accompanied by an adult who is an immediate family member of either the child or the prisoner.

Defendants contend that *Overton v. Bazzetta* rendered this Court's judgment unenforceable and that the Sixth Circuit recognized in its Order Vacating and Remanding and its

October 24, 2003 Order (denying Defendants' motion to vacate this Court's order of compliance) that this Court's findings of fact and conclusions of law are no longer valid, and therefore cannot be enforced. Those Sixth Circuit orders, however, did not vacate this Court's judgment for Plaintiffs or otherwise render it invalid. Rather, the Sixth Circuit remanded the case to this Court "for further consideration in light of the Supreme Court opinion." (Order Vacating and Remanding at 2.) The Court therefore grants Plaintiffs' motion to enforce compliance and orders a conference with counsel on January 13, 2004 at 3:00 to discuss implementation of specific provisions.

C. Defendants' Motion to Place Attorney Fees in Escrow

On June 27, 2002, this Court ordered Defendants to pay Plaintiffs' "undisputed" interim attorney fees and costs. Defendants did not seek any rehearing of this order nor did they appeal it. It is the money paid pursuant to this order that Defendants move to place in escrow. On August 19, 2002, this Court granted Plaintiffs' Motion for Attorney Fees, awarding $570,167.35 in additional fees. Defendants appealed this second Order, and filed a supersedeas bond for $570,167.35 pending appeal. Following the Supreme Court's decision, the Sixth Circuit remanded the appeal to this Court "for further consideration in light of the Supreme Court's opinion in *Overton v. Bazzetta*, 123 S. Ct. 2162 (2003)." Defendants argued in their briefs that Plaintiffs are not the prevailing parties, and. that the attorney fees awarded to them should be placed in escrow pending final disposition of this matter.

In *Hensley v. Eckerhart*, 416 U.S. 424, 437 (1983), the Supreme Court provided the framework for determining attorney fee awards under Section 1988. First, as a threshold matter, a district court must determine whether the plaintiff is a "prevailing party." In this regard, the *Hensley* Court indicated that "[a] typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in the litigation which

achieves some of the benefit the parties sought in bringing suit'." *Id.* 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). Once plaintiffs have crossed this threshold, they are considered a "prevailing party" within the meaning of Section 1988 and are entitled to a fee award of some kind. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791- 92 (1989). As the Supreme Court explained, "[t]he degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*." *Id.* at 793.

Based on this standard, it is apparent that Plaintiffs remain a prevailing party. They have prevailed on a number of significant issues including the procedural due process violation, their request for injunctive relief, expanded visits for minor children, and recognition of constitutional limits on prisoner visiting restrictions. Given the decision by the Supreme Court, however, it seems that there should be some further consideration of the reasonableness of the attorney fees previously awarded. This issue must be briefed before the Court can rule.

With respect to the issue of escrow, the Court finds such a request to be untimely and unnecessary. Defense counsel missed their opportunity to request that the funds be put in escrow at the outset, and have cited no legal authority to support their argument that nearly eighteen months after money has been paid, the Court can order it into escrow.

The Court orders briefing on the issue of whether the amount of attorneys' fees should be reduced since Defendants prevailed at the Supreme Court on most of the issues (except the procedural due process issue). In reconsidering the attorneys' fees, the Court will consider the entire amount of awarded fees, $794,204.27, not just the limited amount

awarded in the August 19, 2002 appealed order.[1] The Court denies Defendants' motion for escrow.

III. Conclusion

For the reasons stated above, the Court (1) denies Defendants' motion for summary judgment; (2) grants Plaintiffs' motion to enforce compliance; and (3) denies

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[1] Plaintiffs contend that the interim fees paid pursuant to this Court's June 27, 2002 Order cannot now be placed in escrow as those fees were undisputed, Defendants never appealed that Order and that Order is not pending before this Court. Even so, the reasoning supporting the interim fee award was included in Defendants' appeal of the Court's August 19, 2002 Order Granting Plaintiffs' Motion for Attorneys' Fees. That Order granted Plaintiffs' request only as to the total amount requested, $794,204.27, less the amount of the interim award of $224,036.92, which equaled $570,167.35. The Court awarded Plaintiffs the requested $570,167.35. Thus, Plaintiffs are correct that by appealing the August 19, 2002 award of $570,167.35, Defendants did not appeal the interim award of $224,036.92 since that award was not addressed in the Court's August 19, 2002 Order. But to deny any reconsideration of the interim award of attorneys' fees seems overly formalistic.

Defendants' motion to place attorney fees in escrow. The Court orders that counsel appear for a conference on January 13, 2004 at 3:00 to discuss implementation of the Court's prior orders and orders cross briefing on the issue of attorney fees by January 16, 2004.

/s/
Nancy G. Edmunds
U. S. District Judge

Dated: 12/23/03